

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

T.G.

Petitioner,

vs.

SAN ANDREAS REGIONAL CENTER,

Respondent.

OAH No. 2001060066

(Early Intervention Services Act
Gov. Code § 95000 et seq.)

DECISION

This matter was heard before Jonathan Lew, Administrative Law Judge, State of California, Office of Administrative Hearings on June 19, 2001.

Petitioner T.G. was represented by his parents.

The San Andreas Regional Center (SARC) was represented by Marilyn Bryson, District Manager, Children's Services.

The case was submitted for decision on June 19, 2001.

ISSUE

Whether petitioner is entitled to compensatory speech therapy. He was approved for such therapy from January 2001, but it was not provided until late March. A related issue is whether compensatory services are available beyond age three, the statutory age of entitlement in this case.

FACTUAL FINDINGS

1. Petitioner was born on May 21, 1998. He was assessed and found eligible for services under the Early Start Program (ESP) due to delays in his speech and language development.
2. An IFSP was developed on January 18, 2001. One of the services found to be necessary for petitioner was speech therapy, to be provided in individual and/or

small group sessions, one to two times a week and up to sixty minutes per session, in the home. The projected start date was January 29, 2001, continuing through May 21, 2001. SARC accepted responsibility for arranging and paying for this service.

3. SARC was unable to locate a service provider until March 23, and actual services did not commence until March 28, 2001. This was through a home based program called HOPE. Petitioner received speech therapy through this program for two months until his third birthday. His speech therapist at HOPE is Anne Hendrickson. Now that he is three, SARC has determined that petitioner is no longer eligible for services as a regional center client.

4. Petitioner was evaluated for services through the Santa Clara County Office of Education, and an individualized education program (IEP) was developed for one year commencing June 1, 2001. The IEP team determined that petitioner meets the state eligibility criteria for speech impairment, and recommended that he receive speech therapy, twice a week, thirty minutes per session. However, the Los Altos School District is only offering petitioner eight sessions of speech therapy during the summer school period, late June through July 25, 2001. No speech therapy services would be offered again until school starts in September. Petitioner will be without speech therapy for a period of about two months.

5. SARC explains that it was very difficult locating a service provider between January and April of this year. ESP and speech therapy service providers were completely full. They had waiting lists and the demand for their services was growing. SARC receives up to twenty new referrals per week for ESP services.

One of the problems SARC encountered was the refusal of service providers to accept the Schedule of Maximum Allowances (SMA) rate for speech therapy. It is equivalent to the MediCal rate of reimbursement and it is a fraction of the prevailing rate. SARC believes it cannot pay an amount in excess of the SMA rate without Department permission, or an order compelling them to do so. Local service providers refused to accept children at the SMA rate and SARC could not find qualified vendors to provide speech therapy services for petitioner at the SMA rate.

This changed in April 2001 when SARC obtained a rate exception from the Department of Developmental Services for speech therapy services. SARC was thereafter authorized to pay the prevailing rate for speech therapists, and was prepared to locate a speech therapist for petitioner in a clinical setting as an alternative to a home-based program. It was around this same time that a slot opened up for petitioner at HOPE.

6. Petitioner's parents are concerned that he will be without speech therapy for the two months between July 25 and the beginning of the school year. They would like SARC to credit petitioner for speech therapy to which he was entitled but that he did not receive in February and March of this year. They propose that this be

used to pay for speech therapy during the summer gap in services between July and September. The parents would like for petitioner to continue services with Anne Hendrickson, his speech therapist at HOPE. Ms. Hendrickson notes that petitioner needs consistency in his therapy and that he has shown significant progress since beginning speech therapy. It is hard for him to warm up to people, and she has apparently established a positive relationship with him.

7. SARC does not believe that it is authorized to offer compensatory speech therapy services to petitioner.

LEGAL CONCLUSIONS

1. Controlling law is Part C of the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. §§ 1401-1487.) This is a federal program. Each state was given the opportunity to receive federal funds for the provision of services to children thirty-six months of age and younger, if they complied with specific federal rules and regulations. California chose to participate and passed the necessary legislation. The program goes under the name “Early Start.” California’s Early Intervention Services Act is found at Government Code sections 95000 *et seq.* Regulations were also adopted and are found at Title 17 California Code of Regulations sections 52000 through 52175.

The Early Intervention Services Act provides that the Department of Developmental Services is responsible for administering the Early Start Program, and that direct services to infants and toddlers shall be provided through the regional center system that was established under the Lanterman Developmental Services Act (Lanterman Act). (Gov. Code, §§ 95004(a) and 95014(b).)

2. The California Legislature has found that early intervention services represent an investment of resources, “in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization. (Gov. Code, § 95005, subd. (a)(2).) Importantly, the Legislature has recognized that time is of the essence and that “[t]he earlier intervention is started, the greater is the ultimate cost-effectiveness and the higher is the educational attainment and quality of life achieved by children with disabilities.” (*Id.*)

3. The Lanterman Act created the regional center system. (Welf. & Inst. Code, §§ 4620 – 4669.8.) One provision of the Lanterman Act requires the Department of Developmental Services to establish a process of setting rates for services purchased by regional centers. (Welf. & Inst. Code, § 4690.) In implementing that provision, the Department of Developmental Services adopted the SMA for services reimbursable under the Medi-Cal program. (Cal. Code Regs., tit. 17, § 57210, subd. (a)(14).) When purchasing a service, regional centers are not

permitted to exceed the applicable SMA rate for that service. (Welf. & Inst. Code, § 4648, subd. (a)(4).)

4. SARC believes that it has to receive a rate exception from the Department of Developmental Services before it can pay for services beyond the SMA rate. This is not so. Although Early Start services are administered through the regional centers created by the Lanterman Act, neither the provisions of that act nor the regulations implementing it govern the Early Start program in any respect. Early Start is a federal program, governed solely by federal law as implemented by the California Early Intervention Services Act and its enabling regulations.

The federal law, Subchapter III of IDEA, clearly provides that Early Start services are to be provided at no cost and without limitation, unless federal or state law provides for a system of payments by families, including a schedule of sliding fees. (20 U.S.C. § 1432(4)(B). See also 34 CFR § 303.12(a)(3)(iv).) No limitations upon the allowable cost of Early Start services are found in federal law. Similarly, neither the California Early Intervention Services Act nor the regulations implementing that act make the SMA limitations imposed in the Lanterman Act applicable to the Early Start program.

5. Accordingly, regional centers are not limited by the SMA rates in funding Early Start services. The SMA rate limitations generally apply to Lanterman Act cases. It also follows that SARC was not required to seek and receive a rate exception from the Department of Developmental Services in order to pay for Early Start services at rates exceeding those that would be allowed under the Lanterman Act. It could have paid the prevailing rate for speech therapy as early as January 2001 in this case.

6. Petitioner's parents' request that he be provided compensatory speech therapy services to make up for the time petitioner has lost because of SARC's failure to timely locate and fund speech therapy services. These compensatory services would be utilized over the summer months that petitioner is not receiving speech therapy under his IEP, a period of approximately two months starting July 25.

7. Petitioner's parents request for compensatory services should be granted. The IDEA empowers courts to grant parties such relief as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dep't of Educ.* (1985) 471 U.S. 359.) On the theory that Congress did not intend the IDEA to entitle disabled children to a free education only where a child's parents are able to pay for private placement during a legal challenge to proposed services, *Burlington* has been extended to allow district courts to grant compensatory educational services to remedy past deprivations caused by violations of the IDEA. (See *Pihl v. Massachusetts Dep't of Educ.* (1st Cir. 1993) 9 F.3d 184, 188-90; *Hall v. Knott County Bd. Of Educ.* (6th Cir. 1991) 941 F.2d 402, 407; *Lester H. v. Gilhool* (3d Cir.

1990), 916 F.2d 865, 872-73; *Jefferson County Bd. Of Educ. v. Breen* (11th Cir.1988) 853 F.2d 853, 857-58; *Miener v. Missouri* (8th Cir. 1986) 800 F.2d 749, 753-54.)

Importantly, compensatory services have not been limited as a remedy to cases where the student remains within the age range for eligibility under the IDEA. (*Pihl v. Massachusetts Dep't of Educ.*, *supra*, 9 F.3d at 189; *Wagner v. Short* (D. Md. 1999) 63 F.Supp.2d 672, 675.) In *Pihl*, a twenty-seven year old plaintiff filed a lawsuit alleging that he was denied services due him as a disabled child. The district court dismissed the action as moot because he had passed the age of entitlement to services. The First Circuit reversed, finding that the IDEA empowers courts to grant compensatory services to plaintiffs who are beyond the statutory age of entitlement. (*Id.* at pp. 189-90.) The court determined that compensatory education must be available beyond the statutory age of entitlement to give meaning to a disabled student's right to an education. (*Id.* at p. 189.) The school districts could otherwise simply "stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations." (*Id.*)

8. The same reasoning applies here. Petitioner was eligible for services from January 29, 2001. His need for speech therapy services then and now is undisputed. SARC was authorized to pay the prevailing rate for speech therapy at that time. It did not have to obtain a rate exception from the Department of Developmental Services as it believed it was required to do. The rate exception process is both time-consuming and uncertain. Petitioner waited two months before speech therapy began in April, and then these services ended abruptly in May after he turned three. Had petitioner's parents been able to pay privately for speech therapy at the prevailing rate from January, they surely would have been entitled to reimbursement today. (*Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, *supra*, 471 U.S. 379; *Florence County School District Four v. Carter* (1993) 510 U.S. 7; *Still v. DeBuono* (2d Cir. 1996) 101 F.3d 888.) Reason and fairness dictate that they should now be entitled to compensatory speech therapy as a remedy for deprivation of these same services in February and March. Congress certainly did not intend for disabled children to receive free speech therapy only when their parents were able to pay for private placement and later be reimbursed by regional centers.

Special consideration is also given to the fact that petitioner will be without speech therapy services for roughly two months between summer and fall school sessions. This is based solely on the school district's schedule. Petitioner's need for speech therapy services between July 25 and the start of school is continuing. There is no evidence that his need for services will be any less than it is now.

By reason of the above, petitioner's parents request for compensatory speech therapy services should be granted.

ORDER

SARC shall fund the full and actual cost of necessary speech therapy for petitioner in an amount commensurate with that to which he was entitled to under his IFSP over the period January 29 through March 28, 2001. These services shall be provided over the period this summer that petitioner is not receiving speech therapy through the Los Altos School District.

DATED: _____

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings